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Supreme Court U.S.
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No. 00-836

IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE W. BUSH,
Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, et al.
Respondents.

On Petition For Writ of Certiorari
to the Florida Supreme Court

BROWARD COUNTY CANVASSING BOARD'S AND BROWARD COUNTY SUPERVISOR OF ELECTION'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

EDWARD A. DION
County Attorney for Broward County
Counsel of Record
ANDREW J. MEYERS
Chief Appellate Counsel
NORMAN M. OSTRAU
Deputy County Attorney
TAMARA M. SCRUDDERS
Assistant County Attorney
JOSE ARROJO
Assistant County Attorney
Government Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301

Counsel for the Broward County Canvassing Board

SAMUEL S. GOREN
Counsel of Record
MICHAEL D. CIRULLO
Josias, Goren, Cherof,
Doody & Ezrol, P.A.
3099 East Commercial
Blvd., Suite 200
Fort Lauderdale, Florida
33308
Telephone: (954) 771-4500

Counsel for the Broward
County
Supervisor of Elections

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STATEMENT OF THE CASE

After the November 7, 2000 general election, the Broward County Canvassing Board (the "Board") conducted a statutorily-mandated machine recount of the votes cast for President/Vice President. Consistent with the requirements of §102.166(4), Florida Statutes, the Board then conducted a limited manual recount of the votes cast in three precincts, which comprised more than one percent (1%) of the total votes cast in Broward County. The Board determined that the results of the limited manual recount indicated an error in vote tabulation that could affect the outcome of the election. As a result of this determination, the Board was statutorily required, pursuant to §102.166(5)(c), Florida Statutes, to conduct a county-wide manual recount of all ballots in Broward County cast for President of the United States.

The Board began its full manual recount on Wednesday, November 15, 2000, at 2:00p.m.. From that date, the Board worked continuously, without taking any days off, even for the Thanksgiving holiday. Initially, the Board, as well as hundreds of county employees and party observers, worked from 8:00 a.m. until 6:00 p.m. each day, but the Board increased its hours even further as the recount continued, working several days from 8:00 a.m. until 11:00 p.m. After working eleven (11) consecutive days, the manual recount concluded on Saturday, November 25, 2000 shortly before midnight.

As stated in the certifications attached hereto as Exhibits "A" and "B", which were filed with the Secretary of State on November 8, 2000 and November 26, 2000, respectively, the manual recount resulted in One Thousand Seven Hundred Twenty-One (1,721) additional valid votes being included in the vote totals for Broward County.

ARGUMENT

I. THE FLORIDA SUPREME COURT'S HOLDING DOES NOT VIOLATE THE DUE PROCESS CLAUSE OR 3 U.S.C. §5.

Under 3 U.S.C. §5, a determination regarding the appointment of presidential electors pursuant to Florida's Election Code "shall be conclusive" provided:

1. The applicable provisions of the Florida Election Code were "enacted prior to the day fixed for appointment of the electors;" and
2. The determination is made by December 12, 2000, which is six days prior to the meeting of the electors under 3 U.S.C. §7 (2000).

A. The Supreme Court of Florida Did Not Rewrite the Applicable Provisions of the Florida Election Code.

The Florida Supreme Court decision did not impose post-election judicial limitations on state executive officials. Nor did it impose judicially created standards for the determination of controversies concerning the appointment of presidential electors. Rather, the Florida Supreme Court's decision interpreted existing Florida statutes as required to harmonize the various provisions of the Florida Election Code so as to give effect to the overall purpose and intent of Florida's election laws. In the Court's own words, the decision of the Florida Supreme Court was "consistent with the Florida election scheme."

It has long been the law in Florida that wherever it is possible to do so, a court must construe statutory sections so they operate in harmony with each other. *Palm Harbor Special Fire Control District v. Kelly*, 516 So.2d 249 (Fla. 1987). In this case, the Florida Supreme Court's decision does exactly that, squaring the express language of Florida's statutory provisions governing the election process with the intent and purpose behind those provisions. At the same time, the Florida Supreme Court ensured that each vote in counties utilizing manual recounts can be accurately counted, and that Florida's ability to appoint its electors by December 12, 2000 will not be jeopardized.

By providing that the Secretary of State was required to accept amended certifications from the county canvassing boards, the Florida Supreme Court's holding did nothing more than interpret Florida law in a manner to allow for what was intended-- to permit enough time for pre-certification manual recounts as well as post-certification contests. The Court recognized that Florida's Election Code contains no deadlines for filing corrected, amended or supplemental vote returns. The Court further recognized that while Florida statutes specifically provide for manual recounts, the recounts could not be accomplished in larger counties, like Broward County, within the seven (7) day period contained in §102.166, Florida Statutes (2000).

This latter recognition was confirmed by the actual experience of the Broward County Canvassing Board, which required eleven (11) consecutive arduous days, working long hours without a break, to accurately complete the recount of approximately 588,000 ballots in Broward County. As a result, more than 1,700 votes from Broward County not previously counted were included in the final vote total certified by the Secretary of State on November 26, 2000. The inclusion of those votes is what was intended by the Legislature when it provided for a procedure for manual recounts. That goal was accomplished in Broward County, with absolutely no impact on any other part of the election process.

The provisions of the Florida Election Code, upon which the manual recount vote total was based, were enacted by the Florida Legislature prior to the day fixed for appointment of the electors. As such, the final vote totals from Broward County was determined consistent with 3 U.S.C. §5.

B. Contrary to Petitioner's Assertions, Neither the Decision of the Supreme Court of Florida Nor the Board's Manual Recount Thwart the Will of the Electorate.

In its introduction, Petitioner asserts that the decision of the Supreme Court of Florida "appears designed to thwart the will of the electorate . . ." To the contrary, the will of the electorate can only be determined by counting all votes as to which the clear intent

of the voter can be determined. Given the problems clearly evident with machine vote tabulation in Broward County, the Board determined that the manual recount was necessary to determine the true vote totals.

Petitioner further argues that the efforts of the Broward County Canvassing Board were "unrestrained by statutory guidance[.]" This allegation is simply not true. Florida Statute §101.5614(5) provides: "No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." This statutory mandate guided all decisions of the Broward County Canvassing Board.

Petitioner also asserts that the act of manually recounting ballots, which requires handling of the ballots, undermined the physical integrity of the ballots. There is no evidence before this Court to support that bald assertion. Petitioner's failure to cite to any record support equates to an admission that none exists.

II. THE FLORIDA SUPREME COURT'S DECISION IS NOT INCONSISTENT WITH ARTICLE II, SECTION 1, CLAUSE 2 OF THE CONSTITUTION.

As indicated in Section I of this Response, the Florida Supreme Court decision is consistent with Florida Statutes enacted before the election was held. The argument in Section I is incorporated here as Broward County Canvassing Board's response to Question II presented by the Petitioner. It is further submitted that, based on those arguments, the Florida Supreme Court's decision is not inconsistent with Article II, Section 1, clause 2 of the Constitution.

III. IF THIS COURT WERE TO FIND THAT THE FLORIDA SUPREME COURT'S DECISION DOES NOT COMPLY WITH 3 U.S.C. §5, MORE THAN 1,700 VOTERS WOULD BE NEEDLESSLY DISENFRANCHISED.

The Broward County Canvassing Board has invested substantial time and effort in painstakingly examining each ballot cast in Broward County to determine the true intent of each voter and to reach an

accurate count of votes cast. The Board's efforts were consistent with Florida law and pursuant to the clear direction of the Florida Supreme Court.

The direct result of any decision reversing the Florida Supreme Court will be the disenfranchisement of more than 1,700 Broward County voters who validly and lawfully filled in ballots which would be rendered meaningless solely because of the limitations of the county's machine counting system.

CONCLUSION

Wherefore the Broward County Canvassing Board respectfully requests this Court deny the writ of certiorari requested by Petitioners, allowing Broward County's amended certification to stand.

Respectfully submitted,

EDWARD A. DION
Broward County Attorney
Governmental Center, Suite 423
115 South Andrews Avenue
Ft. Lauderdale, Florida 33301
Telephone: (954) 357-7600
Facsimile: (954) 357-7641

By: Edward A. Dion

EDWARD A. DION
Florida Bar No. 267732
Counsel of Record
ANDREW J. MEYERS
Chief Appellate Counsel
Florida Bar No. 709816
NORMAN M. OSTRAU
Deputy County Attorney
Florida Bar No. 273971
TAMARA M. SCRUDDERS
Assistant County Attorney
Florida Bar No. 868426

JOSE ARROJO
Assistant County Attorney
Florida Bar No. 744808

Counsel for Broward County Canvassing Bd.

SAMUEL S. GOREN
MICHAEL D. CIRULLO
Josias, Goren, Cherof, Doody & Ezrol, P.A.
3099 East Commercial Blvd., Suite 200
Fort Lauderdale, Florida 33308

By: Edward A. Dean, for

SAMUEL S. GOREN
Fla. Bar No. 205850
MICHAEL D. CIRULLO
Fla. Bar No. 973180

Counsel for Broward County Supervisor of Elections